No. 14-981

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IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE

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QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher* v. *University of Texas at Austin*, 133 S. Ct. 2411 (2013).

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Cases **Page(s)**

Fisher v. *University of Texas at Austin*,
133 S. Ct. 2411 (2013) ..... *passim*

Gideon v. *Wainwright*,
372 U.S. 335 (1963) 13

Grutter v. *Bollinger*,
539 U.S. 306 (2003) ..... *passim*

Parents Involved in Community Schools v. *Seattle School District No. 1*,
551 U.S. 701 (2006) 18

Regents of the University of California v. *Bakke*,
438 U.S. 265 (1978) 3, 19

Romer v. *Evans*,
517 U.S. 620 (1996) 23

Strickland v. *Washington*,
466 U.S. 668 (1984) 13

Sugarman v. *Dougall*,
413 U.S. 634 (1973) 10

Texas Department of Housing & Community Affairs v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) 17, 18

Thomas v. *Eastman Kodak Co.*, 183 F.3d 38 (1st Cir. 1999) 34

Trammel v. *United States*, 445 U.S. 40 (1980) 28

OTHER AUTHORITIES

Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 109th Cong. 277 (2006) 26

Brief of ABA as Amicus Curiae in Support of Respondent, *De Funis* v. *Odegaard*, 416 U.S. 312 (1974) (No. 73-235) 6

Brief of ABA, Amicus Curiae, *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) (No. 76-811) 6

Brief of ABA as Amicus Curiae in Support of Respondents, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (No. 02-241) 6

Brief of ABA as Amicus Curiae in Support of Respondents and Urging Affirmance, *Fisher* v. *University of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) 6

ABA Groups Goal III, ABA, http://www.americanbar.org/groups/diversity/DiversityCommission/goal3.html (last visited Oct. 25, 2015) 2, 3

ABA Mission and Goals, ABA, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Oct. 25, 2015) 3

ABA Standards and Rules of Procedure for Approval of Law Schools and Interpretations (1981) 3

ABA Standards and Rules of Procedure for Approval of Law Schools: 2015–2016 (2015) 4

Diversity Related Resolutions, ABA Center for Racial & Ethnic Diversity, http://www.americanbar.org/groups/diversity/pages/DiversityRelatedResolutions.html (last visited Oct. 25, 2015) 5

ABA House of Delegates, Delegate Handbook (Nov. 1, 2014) 3

House of Delegates General Information, ABA, http://www.abanet.org/leadership/delegates.html (last visited Oct. 25, 2015) 2

ABA Presidential Initiative Commission on Diversity, *Diversity in the Legal Profession: The Next Steps* (2010) 4, 5, 27, 28

Implicit Bias Initiative, ABA Section of Litigation, http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html (last visited Oct. 25, 2015) 6

Brief of the American Educational Research Association et al. as Amici Curiae in Support of Respondents, *Fisher* v. *University of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) 20

Brief of the American Law Deans Society as Amicus Curiae in Support of Respondents, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) 37

Shamena Anwar, Patrick Bayer, Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, Q. J. of Econ. 1 (2012) 15

Brief of Amicus Curiae Association of American Law Schools in Support of Respondents, *Fisher* v. *University of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) 37

David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998) 16

Frank R. Baumgartner, Amanda Grigg & Alisa Mastro, *#BlackLivesDon'tMatter: Race-of-Victim Effects in US Executions, 1976–2013* (2015) 16

Albert P. Blaustein & Charles O. Porter, The American Lawyer: A Summary of the Survey of the Legal Profession (1954) 10

William G. Bowen & Derek Bok, The Shape of the River (1998) 35

Brief of California Institute of Technology et al. as Amici Curiae in Support of Respondents, *Fisher* v. *University of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) 37, 38

Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 Calif. L. Rev. 1109 (2003) 20, 24, 25

Justice Ming W. Chin, *Looking Ahead on the Journey for Diversity*, 48 ABA Judges' Journal (Summer 2009) 25

Jaffe D. Dickerson & Matthew Scott, *General Counsel Share Keys to Success*, Minority Corporate Counsel Association, Diversity and the Bar (Nov. 1999), http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1044 36

Judge Bernice Bouie Donald, *Foreword* to LSAC & ABA in conjunction with the American Bar Foundation, Landscape of Legal Diversity (forthcoming 2015) 24

Judge Harry T. Edwards, *Race and the Judiciary*, 20 Yale L. & Pol'y Rev. 325 (2002) 27

Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (Aug. 2010) 14

Nicholas Fandos, *A Study Documents the Paucity of Black Elected Prosecutors: Zero in Most States*, N.Y. Times (July 7, 2015), http://www.nytimes.com/2015/07/07/us/a-study-documents-the-paucity-of-black-elected-prosecutors-zero-in-most-states.html?_r=2 32

History of the Federal Judiciary: Biographical Directory of Federal Judges, 1789–present, Federal Judicial Center, http://www.fjc.gov/history/home.nsf/page/judges.html (last visited Oct. 27, 2015) 36

Justice Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 Sw. U.L. Rev. 189 (2003) 27

Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012) 14

Christopher Hartney & Linh Vuong, National Council on Crime and Delinquency, *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System* (Mar. 2009) 16

Spencer Headworth, *Incarceration, in* LSAC & ABA in conjunction with the American Bar Foundation, Landscape of Legal Diversity (forthcoming 2015) 15, 24

Judge Michael B. Hyman, *What the Blindfold Hides*, 48 ABA Judges' Journal (Fall 2009) 25

Institute for Inclusion in the Legal Profession, *IILP Review: The State of Diversity and Inclusion in the Legal Profession* (2014) 32

Cynthia Jones, "*Give Us Free*": *Addressing Racial Disparities in Bail Determinations*, 16 Legislation and Pub. Pol'y 919 (2013) 12, 17

Jerry Kang, National Center for State Courts, *Implicit Bias: A Primer for Courts* (2009) 11, 18

Ryan D. King, Kecia R. Johnson, and Kelly McGeever, *Demography of the Legal Profession and Racial Disparities in Sentencing*, 44 L. & Soc'y Rev. 1 (2010) 35

Besiki Luka Kutateladze & Nancy R. Andiloro, Vera Institute of Justice, *Prosecution and Racial Justice in New York County* (2014) 12, 17

Admitted Applicants by Ethnic and Gender Group, LSAC.org http://www.lsac.org/lsacresources/data/ethnic-gender-applicants (last visited Oct. 10, 2015) 35

Top 240 ABA Applicant Feeder Schools for Fall Applicants, LSAC.org, http://www.lsac.org/docs/default-source/data-(lsac-resources)-docs/top-240-feeder-schools.pdf (last visited Oct. 25, 2015) 30

Marc Maurer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, ABA Hum. Rts. Mag. Vol. 37, No. 4 (Fall 2010) 16

Presence of Women and Attorneys of Color in Large Law Firms Continues to Rise Slowly, NALP (Nov. 15, 2000), http://www.nalp.org/2000presenceofwomenattorneysofcolor 35

Women and Minorities at Law Firms by Race and Ethnicity—An Update, NALP (May 2015), http://www.nalp.org/0515research 31

NALP Foundation for Law Career Research and Education, *Update on Associate Attrition: Findings from a National Study of Law Firm Associate Hiring and Departures—Calendar Year 2014* (2015) 34

New York City Bar Office for Diversity and Inclusion, *2014 Diversity Benchmarking Report: Update to the Signatories of the Statement of Diversity Principles* (2014) 34

The New York Times/CBS Poll on Race Relations in the U.S., N.Y. Times (July 23, 2015), http://www.nytimes.com/interactive/2015/07/23/us/document-new-york-timescbs-news-poll-on-race-relations-in-the-us.html. 24

Ursula Noye, Reprieve Australia, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office* (Aug. 2015) 14, 15

Justice Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217 (1992) 26

Elizabeth Olson, *A Long and Arduous Path to Partnership for Black Lawyers*, N.Y. Times, Aug. 18, 2015, http://www.nytimes.com/2015/08/18/business/dealbook/many-black-lawyers-navigate-a-rocky-lonely-road-to-partner.html?_r=0 33

Gary Orfield & Erica Frankenberg, The Civil Rights Project, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future* (May 2014) 21, 22

Raymond Paternoster & Robert Brame, *Reassessing Race Disparities in Maryland Capital Cases*, 46 Criminology 4 (2008) 16

Gary R. Pike et al., *Evaluating the Rationale for Affirmative Action in College Admissions: Direct and Indirect Relationships Between Campus Diversity and Gains in Understanding Diverse Groups*, 48 J.C. Student Dev. 166 (2007) 20

Arin N. Reeves, Nextions, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills* (2014) 33

Deborah L. Rhode & Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 Fordham L. Rev. 2483 (2015) 30, 32

Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation*, The Washington Post Online (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that 36

L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626 (2013) 13

Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 Geo. J. Legal Ethics 155 (2006) 29

Robert J. Smith, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U.L. Rev. 795 (2012) 12

Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences*, Univ. of Mich. Law Sch. Program in Law & Econ. Working Paper No. 12-002, Working Paper Series (2012) 16

Brief of Amicus Curiae The University of North Carolina at Chapel Hill Supporting Respondents, *Fisher* v. *University of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) 38

QuickFacts: United States, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/00000.html (last revised Sept. 30, 2015, 11:29 PM) 31

U.S. Census Bureau, U.S. Department of Commerce, Overview of Race and Hispanic Origin: 2010 (2011) 31

U.S. International Services Tables, U.S. Department of Commerce, Bureau of Econ. Analysis (Oct. 15, 2015) 29

U.S. Department of Justice, United States Attorneys' Manual, Section 9-27.110 (B), http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution 11, 12

U.S. Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* (Mar. 4, 2015) 13, 14

U.S. Sentencing Commission, *Demographic Differences in Sentencing, in* Booker Report 2012: Part E (2012) 15

Press Release, Women Donors Network, New WDN Study Documents the Paucity of Black Elected Prosecutors (July 7, 2015), http://www.womendonors.org/new-wdn-study-documents-the-paucity-of-black-elected-prosecutors/ 32

Eric K. Yamamoto, *The Color Fault Lines: Asian American Justice from 2000*, 8 Asian L.J. 153 (2001) 29

INTEREST OF AMICUS CURIAE[1]

The American Bar Association ("ABA") as amicus curiae respectfully submits this brief in support of Respondents. The ABA requests the Court to hold that Respondents' efforts to achieve a diverse student body by using an admissions policy that takes race into account as merely one of many factors is constitutional and consistent with this Court's precedent. The ABA respectfully submits that such policies are important tools for ensuring that all lawyers are less likely to be influenced by racial bias and stereotypes, ensuring that our legal and political institutions fully reflect and represent all members of society, and advancing the goal of eliminating racial bias in the legal profession and the justice system.

The ABA is one of the largest voluntary professional membership organizations, and the leading national membership organization for the legal profession. The ABA's more than 400,000 members practice in all fifty states, the District of Columbia, and the United States Territories, and include attorneys in private firms, corporations, non-profit organizations, and government agencies. They also include judges, legislators, law professors,

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[1] Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus curiae and their counsel, made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

law students, and non-lawyer "associates" in related fields.[2]

The ABA has worked for decades to ensure that members of all racial and ethnic groups in the United States are well-represented in our legal profession, judicial system, and political and business institutions. In 1967, the ABA endorsed the development of a national program to encourage and assist qualified but underprivileged persons from minority groups to enter law school and the legal profession. In 1972, the ABA formally adopted a policy reaffirming this position.[3] More recently, in 2008, the ABA adopted as one of its four main goals to "[p]romote full and equal participation in the association, our profession, and the justice system by all persons" and to "[e]liminate bias in the legal profession and the justice system."[4]

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[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of the positions in it.

[3] Resolutions become ABA policy only after adoption by vote of the ABA's House of Delegates ("HOD"). The HOD now has 560 delegates, representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, individual ABA members, and the Attorney General of the United States, among others. *See House of Delegates General Information*, ABA, http://www.abanet.org/leadership/delegates.html (last visited Oct. 25, 2015).

[4] *ABA Mission and Goals*, ABA, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Oct. 25, 2015); *see also ABA Groups*

In anticipation of this Court's decision in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), the ABA created a task force to analyze the decision's potential implications for law schools, and to develop recommendations for constructive implementation. In addition, the ABA's Section on Legal Education and Admission to the Bar held public meetings and conferences, which resulted in the adoption of Standard 212 of the ABA Standards and Procedure for Approval of Law Schools.[5] As adopted in 1980, Standard 212 required that law schools provide "full opportunities for the study of law and entry into the profession by qualified" racial and ethnic minorities.[6] Standard 212 was amended in 2006 after this Court's holding in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and in August 2014, it was replaced with Standard 206, which continues to state, in pertinent part:

Goal III, ABA, http://diversity/DiversityCommission/goal3.html (last visited Oct. 25, 2015); ABA HOD Delegate Handbook 12 (Nov. 1, 2014), http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2014_2015_new_delegate_handbook_final.authcheckdam.pdf.

[5] The ABA's Section on Legal Education and Admission to the Bar was formed by the ABA in 1893, and its Council has been approved by the (now) United States Department of Education since 1952 as the national agency for accrediting programs leading to the Juris Doctor degree.

[6] *See* ABA Standards and Rules of Procedure for Approval of Law Schools and Interpretations, Standard 212 (1981), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1981_standards.authcheckdam.pdf.

> Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.[7]

ABA Standards thus urge law schools to take concrete actions to enroll a diverse student body, which "promotes cross-cultural understanding, helps break down racial, ethnic, and gender stereotypes, and enables students to better understand persons of different backgrounds."[8]

The ABA has taken additional steps to promote diversity in the legal profession. In 2010, for example, the ABA Presidential Initiative Commission on Diversity issued a report on the state of diversity in the legal profession.[9] This

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[7] ABA Standards and Rules of Procedure for Approval of Law Schools: 2015–2016, Standard 206, at 12 (2015), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_aba_standards_for_approval_of_law_schools_final.authcheckdam.pdf.

[8] *Id.*, Interpretation 206-2 at 13.

[9] ABA Presidential Initiative Commission on Diversity, *Diversity in the Legal Profession: The Next Steps* (2010), http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf ("*Next Steps*").

report found that while there had been some progress, "the lack of genuine diversity remains a disappointment" and racial and ethnic groups "continue to be vastly underrepresented in the legal profession."[10]

The ABA also has worked to strengthen the educational pipeline necessary for a diverse and inclusive legal profession. For example, the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline provides services to increase diversity among students in the educational pipeline. The ABA also has adopted educational pipeline policies, including one in 2006 that urges state, territorial, and local bar associations to work with national, state, and territorial bar examiners, law schools, universities, and elementary and secondary schools, to address the problems facing minorities within the pipeline to the profession.[11]

In September 2010, in recognition of the ongoing role that implicit and unconscious bias play in the justice system and in the legal profession, the ABA Section of Litigation launched an Implicit Bias Initiative, which features a website providing detailed information, research, and other resources to ABA members and stakeholders about these

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[10] *Id.* at 5.

[11] *Diversity Related Resolutions*, ABA Center for Racial & Ethnic Diversity, http://www.americanbar.org/groups/diversity/pages/DiversityRelatedResolutions.html (last visited Oct. 25, 2015).

issues.[12] In launching this Implicit Bias Initiative, the ABA sought to increase awareness about the problem of implicit bias in the justice system, and by doing so, help to combat and ultimately eliminate this problem.[13]

The ABA also has filed amicus briefs in several cases in which this Court has considered the use of race and ethnicity by institutions of higher education in admissions decisions.[14] In each instance, the ABA has supported admissions programs that help promote a diverse student body, thereby improving diversity in the legal profession.

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[12] *Implicit Bias Initiative*, ABA Section of Litigation, http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html (last visited Oct. 25, 2015).

[13] *Id.*

[14] *See, e.g.*, Br. of ABA as Amicus Curiae in Supp. of Resp't, *De Funis* v. *Odegaard*, 416 U.S. 312 (1974) (No. 73-235), 1974 WL 185633; Br. of ABA, Amicus Curiae, *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 188006; Br. of ABA as Amicus Curiae in Supp. of Resp'ts, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (No. 02-241); Br. of ABA as Amicus Curiae in Supp. of Resp'ts and Urging Affirmance, *Fisher* v. *University of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3527859.

SUMMARY OF ARGUMENT

The ABA submits this amicus brief to emphasize the vital role that admissions policies like the one at issue here play in breaking down implicit racial bias and stereotypes that too often result in racially disparate outcomes in our justice system and in areas of public policy where lawyers play a pivotal role.

Admissions policies that take race into account as only one factor among others play an important role in increasing the number of qualified minority lawyers in the legal profession, thereby creating the diversity essential to the legitimacy of our legal system. Equally important, these policies help to produce lawyers who, in their roles as judges, prosecutors, public officials, legislators, and advocates, are less likely to be influenced by racial bias and stereotypes when making critical decisions that affect the lives of numerous individuals, families, communities, and society at large.

There is considerable evidence that, in fact, many decisions and actions by lawyers today are influenced by implicit or unconscious racial bias and stereotypes that contribute to the denial of equal justice under law. Admissions policies that consider race as one of many factors are an important tool to help eliminate racial biases and stereotypes. As this Court has long recognized, diverse educational environments expose all students to people with varied backgrounds and experiences, and thus better promote a robust exchange of ideas and perspectives. In doing so, they help to produce

lawyers who are more open to different perspectives and less likely to be influenced by racial bias and stereotypes. Diverse educational environments, therefore, improve the capacity of all lawyers to fulfill their critical role in the fair implementation of justice and public policy.

Admissions policies that consider race as only one factor among many also help to increase the number of qualified, racially diverse students in the educational pipeline to the legal profession. By helping to break down racial stereotypes and biases, these admissions policies may also help to address factors that inhibit the retention and advancement of minority lawyers in the legal profession. Such admissions policies therefore help increase diversity in the legal profession, which is crucial for sustaining public faith and trust in our legal and political institutions.

Improving minority representation in the legal profession also helps to ensure that lawyers in the United States are capable of serving an increasingly diverse domestic population and remaining competitive in an increasingly global economy.

Over the past half-century, admissions programs like the one at issue here have enabled meaningful progress in diversifying the legal profession and creating educational environments that help to dismantle racial bias and stereotypes. However, much progress remains to be made. Thus, the ABA urges the Court to reaffirm that admissions policies that take race into account as one factor out of many are consistent with the principles espoused for many

years in the Court's jurisprudence and further the compelling interest of diversity in higher education.

ARGUMENT

I. DIVERSE EDUCATIONAL INSTITUTIONS ARE NEEDED SO THAT ALL THE LAWYERS THEY PRODUCE ARE BETTER ABLE TO ADMINISTER JUSTICE AND PUBLIC POLICY WITHOUT BIAS

This Court has long recognized that a principal benefit of admissions policies that consider race as one factor among others for admission to colleges and universities is the creation of diverse student bodies that help to break down racial biases and stereotypes. The continued use of such policies is particularly important to the legal profession. Substantial evidence indicates that racial bias and stereotypes adversely affect the justice system and other areas of public policy in which lawyers play pivotal roles. It is therefore vital that colleges and universities, which serve as a pipeline to the legal profession, have the flexibility to use such admissions policies to ensure that all of the lawyers that these educational institutions produce are less likely to be influenced by racial bias and stereotypes.

A. There Is Substantial Evidence That Implicit Racial Bias and Stereotypes Impact the Administration of Justice and Public Policy

Lawyers are central to the fair implementation of law and public policy. As advisers, advocates,

judges, and arbitrators, lawyers defend and advocate for individual rights and liberties, resolve disputes, and mete out justice. To be a lawyer is to accept a charge to advance democratic ideals and institutions.[15] Lawyers also serve as our nation's political and civic leaders, "perform[ing] functions that go to the heart of representative government." *Sugarman* v. *Dougall,* 413 U.S. 634, 647 (1973). As legislators, government officials, judges, and prosecutors, lawyers craft, interpret, and defend our laws and our national, state, and local governmental policies.

There is substantial and growing evidence that, in performing these pivotal roles, lawyers, like all members of society, may at times be influenced by implicit and unconscious racial bias. Implicit bias has been generally described by one researcher as follows:

> We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. And just as we might have implicit cognitions that help us walk and drive, we have

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[15] *See* Albert P. Blaustein & Charles O. Porter, The American Lawyer: A Summary of the Survey of the Legal Profession vi (1954) ("Under a government of laws the lives, the fortunes, and the freedom of the people are wholly dependent upon the enforcement of their constitutional rights by an independent judiciary and an independent bar. The legal profession is a public profession. Lawyers are public servants.").

> implicit social cognitions that guide our thinking about social categories. . . . If we unpack these schemas further, we see that some of the underlying cognitions include stereotypes, which are simply traits that we associate with a category. . . . Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful.

Jerry Kang, Nat'l Ctr. for State Courts, *Implicit Bias: A Primer for Courts* 1–2 (2009).[16] Implicit biases held by lawyers—in their various roles as prosecutors, defense lawyers, judges, public officials, and legislators—have the potential to influence their decision making in such a way as to adversely affect the fair administration of justice and public policy.

Prosecutors, for example, exercise substantial discretion in deciding whether to file charges against a potential defendant, change or reduce charges, plea bargain, and make sentencing recommendations.[17] If these decisions are

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[16] http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf.

[17] *See, e.g.*, U.S. Dep't of Justice, United States Attorneys' Manual, Section 9-27.110 (B), http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution (last updated Dec. 2014) ("Under the Federal criminal justice system, the prosecutor has wide latitude in

influenced by implicit racial bias, individual defendants and their families may be negatively affected. Studies have shown, for example, that African American and Hispanic/Latino defendants are more likely to be held in custody after arraignment and to receive a custodial plea offer as opposed to a non-custodial sentence offer, less likely to receive a reduced charge offer, and more likely to be incarcerated than white defendants, even when controlling for factors such as arrest circumstances, seriousness of the charge, and prior record.[18]

Defense lawyers, including public defenders and others who represent indigent defendants, also exercise discretion in "determining which clients

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determining when, whom, how, and even whether to prosecute for apparent violations of Federal criminal law."); *see also* Robert J. Smith, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U.L. Rev. 795, 796–97 (2012) (discussing "the range of discretion-based decisions that prosecutors must make on a daily basis," including: "Should an arrested citizen be charged with a crime? At what level should bail be recommended? Should bail be opposed? What crime or crimes will be charged? Should charges be dropped? Should a plea bargain be offered or negotiated? . . . Will minority jurors be challenged for cause or with peremptory challenges? What sentence will be recommended?").

[18] *See, e.g.*, Besiki Luka Kutateladze & Nancy R. Andiloro, Vera Inst. of Justice, *Prosecution and Racial Justice in New York County* ii–iii (2014); *see generally* Cynthia Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 Legislation and Pub. Pol'y 919 (2013).

merit attention and which do not."[19] This Court has long recognized the "crucial role" played by defense counsel in the adversarial system. *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984).[20] As with prosecutors, if these lawyers harbor implicit or unconscious racial biases, such biases will adversely affect the fair administration of justice.

Judges preside over trials and legal disputes, and make numerous other decisions on a daily basis that directly affect all parties to litigation and their families. In performing these roles, judges are not immune from bias and stereotypes, and the potential effect of such bias can be significant. By way of example, the United States Department of Justice's recent investigation of the Ferguson Police Department in Missouri found that, in Ferguson, "[m]unicipal court practices . . . cause disproportionate harm to African Americans," reporting in particular:

> African Americans are 68% less likely than others to have their cases dismissed by the court, and are more likely to have their cases last longer and result in more required court encounters. African Americans are at

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[19] L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626, 2632 (2013).

[20] *See also Gideon* v. *Wainwright*, 372 U.S. 335, 342–44 (1963) (recognizing right to defense counsel as "fundamental and essential to a fair trial").

> least 50% more likely to have their cases lead to an arrest warrant, and accounted for 92% of cases in which an arrest warrant was issued by the Ferguson Municipal Court in 2013.

U.S. Dep't of Justice ("DOJ"), Civil Rights Division, *Investigation of the Ferguson Police Department* 5 (Mar. 4, 2015).[21] Notably, the DOJ concluded that "these disparities occur, at least in part, because of unlawful bias against and stereotypes about African Americans."[22]

Lawyers also play various roles in the jury selection process, which may be significantly affected by racial bias and stereotypes. Studies have shown, for example, that in some states prosecutors strike African American jurors at double or triple the rates of other jurors.[23] Studies

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[21] http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[22] *Id.*

[23] *See, e.g.*, Ursula Noye, Reprieve Australia, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office* (Aug. 2015), http://www.blackstrikes.com/resources/Blackstrikes_Caddo_Parish_August_2015.pdf (examining felony jury trials in Caddo Parish, Louisiana between 2003 and 2012); Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012); Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A*

also report that white juries are more likely to convict African American defendants as compared to white defendants charged with similar crimes.[24] Thus, racial bias in jury selection may in turn exacerbate racially disparate outcomes in the administration of justice.

In fact, the criminal justice system generally, in which lawyers perform various functions, provides numerous examples of outcomes that are potentially influenced by implicit bias and stereotypes. According to a 2012 study by the United States Sentencing Commission, African American male offenders received sentences that were nearly 20 percent longer than "similarly situated" white male offenders, and were 25 percent less likely to receive a sentence below the sentencing guidelines.[25] This

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Continuing Legacy (Aug. 2010), http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf.

[24] *See, e.g.*, Noye, *supra* note 23 at 11 (reporting that "rate of acquittal appears to increase with the number of black jurors"); Shamena Anwar, Patrick Bayer, Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, Q. J. of Econ. 1, 3–4 (2012), http://qje.oxfordjournals.org/content/early/2012/04/15/qje.qjs014.full.pdf (finding that all-white juries in two Florida counties convicted African American defendants more often than white defendants and that this gap was eliminated when the jury includes at least one African American member).

[25] U.S. Sent'g Comm'n, *Demographic Differences in Sentencing*, *in* Booker Report 2012: Part E 2–3 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_E.pdf; *see also* Spencer Headworth, *Incarceration*, *in* Law School Admission Council ("LSAC") & ABA in conjunction with the American Bar Foundation, Landscape of Legal Diversity 10–24

disparity is particularly stark in certain contexts such as drug sentencing and imposition of the death penalty.[26] Relatedly, a review of studies on racial disparities in bail outcomes reported that "African

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(forthcoming 2015) [hereinafter "Landscape"] (discussing racial disparities in incarceration and consequences); Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences*, Univ. of Mich. Law Sch. Program in Law & Econ. Working Paper No. 12-002, Working Paper Series 24 (2012) (finding that African American defendants receive sentences that are approximately 10 percent longer than white defendants arrested for same crimes); Christopher Hartney & Linh Vuong, National Council on Crime and Delinquency, *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System* 3 (Mar. 2009), http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf (finding that African Americans convicted of felonies, violent offenses, and drug offenses were more likely to be sentenced to incarceration, less likely to be sentenced to probation, and likely to receive longer average sentences, than white defendants).

[26] With respect to drug sentencing, *see, e.g.*, Marc Maurer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, ABA Hum. Rts. Mag. Vol. 37, No. 4 (Fall 2010), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/fall2010/justice_for_all_challenging_racial_disparities_criminal_justice_system.html; Hartney & Vuong, *supra* note 25. With respect to capital sentencing, *see, e.g.*, Frank R. Baumgartner, Amanda Grigg & Alisa Mastro, *#BlackLivesDon'tMatter: Race-of-Victim Effects in US Executions, 1976–2013* (2015), http://www.unc.edu/~fbaum/articles/PGI-2015-BlackLives.pdf; Raymond Paternoster & Robert Brame, *Reassessing Race Disparities in Maryland Capital Cases*, 46 Criminology 4, 971, 991–94 (2008); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998).

Americans are subjected to pretrial detention at a higher rate and are subjected to higher bail amounts than are white arrestees with similar charges and similar criminal histories."[27]

Finally, in their capacity as public officials and legislators, lawyers make myriad decisions related to the development and implementation of public policy, and the allocation of public resources. If they are influenced by implicit bias and stereotypes, lawyers playing these roles may exacerbate racially disparate outcomes. For example, lawyers sitting on local school or zoning boards may make decisions that perpetuate residential segregation and racial disparities in public education. Conversely, lawyers also may play a role in identifying and correcting such disparate outcomes. In considering a lawsuit alleging that a Texas state agency's approach to distributing low-income housing tax credits perpetuated racially segregated housing patterns, this Court recently recognized the important role of disparate impact claims in "counteract[ing] unconscious prejudices and disguised animus" that might otherwise exacerbate residential segregation. *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015).

This Court recognized in that decision that while "*[d]e jure* residential segregation by race was

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[27] Jones, *supra* note 18, at 938; *see also* Kutateladze, *supra* note 18 (concluding that "defendants' race can be used to predict the likelihood that they will be held in pretrial detention following their arraignment").

declared unconstitutional almost a century ago, . . . its vestiges remain today, intertwined with the country's economic and social life." *Id.* at 2515.[28] As discussed herein, the vestiges of *de jure* segregation and other forms of racial discrimination remain in many areas of our society, including in the form of implicit bias and racial stereotypes that affect the justice system and the legal profession. Although "[t]he enduring hope is that race should not matter; the reality is that too often it does." *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2006) (Kennedy, J., concurring).[29] Considering the central role of lawyers in the administration of law and public policy, and the "critical importance of exercising fairness and equality" in these legal and political contexts, dismantling racially discriminatory biases and stereotypes that lawyers may hold is of paramount concern to the legal profession.[30]

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[28] *See also Texas Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2525 ("Much progress remains to be made in our Nation's continuing struggle against racial isolation.").

[29] *See also Parents Involved in Cmty. Sch.*, 551 U.S. at 787 ("[O]ur tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain.").

[30] Kang, *supra* note 16, at 2.

B. Admissions Policies That Consider Race as Only One of Many Factors Help Produce Lawyers Who Can Overcome Racial Bias and Stereotypes

As Justice Powell stated in *Bakke*, and this Court reiterated more recently in *Fisher* v. *University of Texas at Austin*, 133 S. Ct. 2411 (2013) ("*Fisher I*"), the "educational benefits that flow from a diverse student body" constitute a "compelling interest that could justify the consideration of race" in university admissions policies. *Fisher I*, 133 S. Ct. at 2418 (citing *Bakke*, 438 U.S. at 307–09). The educational benefits of diversity are substantial. Students from different backgrounds within and among racial groups often have different everyday experiences and different perspectives on a range of issues including, but not limited to, race. Diverse educational environments that bring together students from different racial and other backgrounds encourage a "robust exchange of ideas which discovers truth out of a multitude of tongues." *Bakke*, 438 U.S. at 312 (quoting *United States* v. *Associated Press, D.C.*, 52 F. Supp. 362, 372 (1943)). Such environments promote an "atmosphere of speculation, experiment and creation." *Id.* "'[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'" *Grutter*, 539 U.S. at 330.

Diverse educational environments resulting from admissions policies that consider race as one factor among others also play a critical role in breaking

down racial bias and stereotypes. As the Court recognized in *Grutter*, such diversity promotes "cross-racial understanding," helps to "break down racial stereotypes," and enables students "to better understand people of different races." *Grutter*, 539 U.S. at 330.[31] The Court similarly noted in *Fisher I* that a diverse student body serves to "lessen[] racial isolation and stereotypes." *Fisher I*, 133 S. Ct. at 2418. Academic research on the impact of diversity on college and university communities also has documented positive effects of diverse student populations on student cognitive development and understanding among different racial and ethnic groups.[32] Considering the central role that lawyers

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[31] *See also* Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 Calif. L. Rev. 1109, 1116 (2003) ("A further harm of segregation and underrepresentation is the perpetuation of detrimental stereotypes, continuing the myth that certain groups are inherently incapable of attaining certain accomplishments or performing certain jobs. . . . The visibility of diversity contributes to dispelling long-held stereotypes.").

[32] *See, e.g.*, Gary R. Pike et al., *Evaluating the Rationale for Affirmative Action in College Admissions: Direct and Indirect Relationships Between Campus Diversity and Gains in Understanding Diverse Groups*, 48 J.C. Student Dev. 166, 180 (2007) (finding that "a diverse student population is associated with interactions among diverse peers and that this interaction is related to increased understanding of different racial and ethnic groups"); *see also* Br. of the American Educational Research Association et al. as Amici Curiae in Supp. of Resp'ts 6, *Fisher I*, 133 S. Ct. 2411 (2012) (No. 11-345) ("Research continues to show that racially diverse educational settings are effective in reducing prejudice by promoting greater intergroup contact—both informally and in classroom settings—and encouraging friendships across group lines.").

play in law and public policy, and the ongoing impact of implicit bias in those contexts, exposure to racially diverse educational environments is especially crucial for educating and preparing future lawyers.

Importantly, achieving the foregoing benefits of educational diversity requires more than just "simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students." *Fisher I*, 133 S. Ct. at 2418 (quoting *Bakke*, 438 U.S. at 315 (separate opinion)). Rather, it requires diversity reflecting a "broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* Consideration of race as one factor among many in the admissions process helps to break down racial bias by exposing students to racially diverse students who do not fit stereotypes and have diverse viewpoints, qualities, and skills. "Diminishing the force of such stereotypes" is a crucial component of undergraduate and graduate education. *Grutter*, 539 U.S. at 333.[33]

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[33] Diversity in undergraduate education is all the more important for dismantling racial bias and stereotypes since many K–12 public schools suffer from de facto racial segregation or isolation. Nationwide, the average white, African American, and Latino public school student attends a school comprised of approximately half to three-fourths of students of the same race. Gary Orfield & Erica Frankenberg,

All lawyers are better equipped to serve their critical societal functions when they are educated in diverse environments that help foster a deeper and broader understanding of all members of our society. Lawyers educated in environments that provide meaningful diversity, which includes not only race but other qualities as well, are thus enabled to provide legal services and administer justice and public policy in a fair and proper manner less influenced by racial bias or stereotypes.

II. DIVERSE EDUCATIONAL INSTITUTIONS ENSURE FULL REPRESENTATION OF RACIAL AND ETHNIC MINORITIES IN THE LEGAL PROFESSION

Promoting full representation of racial and ethnic minorities in the legal profession is also important for the legitimacy of our legal and political systems. A diverse legal profession helps to demonstrate that the path to leadership is open to all citizens and that the justice system serves the public in a fair and inclusive manner. Undergraduate admissions programs like the one at issue here, which consider not just race but many other qualities as well, help to increase the number of qualified minority students who are in the pipeline to law school and the legal profession. By promoting diversity in law schools and the legal profession, such admissions

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The Civil Rights Project, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future* 12 (May 2014), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf.

policies also help to break down racial biases and stereotypes, which continue to inhibit the retention and promotion of minority lawyers within the legal profession.

A. Diversity in the Legal Profession Is Important for the Legitimacy of Our Legal and Democratic Institutions

Given the leadership role that lawyers play throughout our democracy, diversity in the legal profession is necessary to engender and sustain trust in our government. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332. Indeed, "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.*

Racial and ethnic diversity in the legal profession is especially necessary to demonstrate that our laws are being made and administered for the benefit of all persons. If the legal profession is not racially inclusive, the public may conclude that the justice system is unfairly controlled by one racial group and does not adequately represent the interests of the population as a whole.[34] A recent

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[34] *See Romer* v. *Evans*, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on

poll revealed that more than three-quarters of African American respondents believe that the criminal justice system is biased against them compared to only 44 percent of white respondents who felt that such a bias exists.[35]

A diverse bar and bench is also an important means of inspiring greater public faith in the rule of law. As to the role of a diverse judiciary, Judge Edward M. Chen, the first Asian American appointed to the United States District Court for the Northern District of California, has observed:

> The case for diversity is especially compelling for the judiciary. It is the business of the courts, after all, to dispense justice fairly and administer the laws equally. It is the branch of government ultimately charged with safeguarding constitutional rights,

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impartial terms to all who seek its assistance."); *see also* Judge Bernice Bouie Donald, *Foreword* to Landscape 1–2 ("[I]t is critical that the police, prosecutors, and judges who administer the system reflect the diversity of their communities. If they do not, they may lose legitimacy in the eyes of citizens, especially racial/ethnic minority communities.").

[35] *The New York Times/CBS Poll on Race Relations in the U.S.*, N.Y. Times (July 23, 2015), http://www.nytimes.com/interactive/2015/07/23/us/document-new-york-timescbs-news-poll-on-race-relations-in-the-us.html. This poll revealed that three-quarters of African American respondents believed that police were more likely to use deadly force against an African American person than a white person, as compared to only one-third of white respondents. *Id.* *See also Incarceration*, *supra* note 25, at 12.

> particularly protecting the rights of vulnerable and disadvantaged minorities against encroachment by the majority. How can the public have confidence and trust in such an institution if it is segregated—if the communities it is supposed to protect are excluded from its ranks?

Chen, *supra* note 31, at 1117.[36]

Lawyers and judges who are members of racial and ethnic minority groups may contribute essential, and oft overlooked, perspectives by sharing their personal histories and unique experiences. As Justice Sandra Day O'Connor said of Justice Thurgood Marshall:

> Although all of us come to the Court with our own personal histories and

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[36] *See also* Judge Michael B. Hyman, *What the Blindfold Hides*, 48 ABA Judges' Journal 32, 33 (Fall 2009) ("Greater diversity demonstrates a commitment to equality in all areas of the law and provides assurance to litigants that the judicial system is attentive to issues of racial discrimination, language barriers, cultural norms, and economic factors that may have an effect on the legal issues in the case."); Justice Ming W. Chin, *Looking Ahead on the Journey for Diversity*, 48 ABA Judges' Journal 18, 20 (Summer 2009) ("[T]he public's respect for judgments and the courts, and the importance of judicial integrity, are reasons why increasing diversity on the bench is so imperative. With diversity on the bench at all levels, we are seeking to improve the quality of our justice system and to enhance the public perception of courts as fair, impartial, and independent.").

> experiences, Justice Marshall brought a special perspective. . . . At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.

Justice Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217 (1992). Justice Samuel Alito has similarly acknowledged the value of bringing his personal history, as the son of immigrants, to bear in cases where the rights of immigrants and the experience of discrimination are involved: "[W]hen a case comes before me involving, let's say, someone who is an immigrant . . . I can't help but think of my own ancestors because it wasn't that long ago when they were in that position. . . . When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account."[37]

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[37] *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 277 (2006), http://www.gpo.gov/fdsys/pkg/CHRG-109shrg25429/html/CHRG-109shrg25429.htm (statement of

Racial and ethnic diversity in the legal profession also improves the quality of legal services and judicial decisions. The ABA firmly believes, based on the experience of its members and on the research it has conducted, that "a diverse legal profession is more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes."[38] As Justice Ruth Bader Ginsburg recognized:

> A system of justice is the richer for the diversity of background and experience of its participants. It is the poorer, in terms of evaluating what is at stake and the impact of its judgments, if its members—its lawyers, jurors, and judges—are all cast from the same mold.

Justice Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 Sw. U.L. Rev. 189, 190 (2003).

It is also crucial that clients have the opportunity to choose lawyers with whom they feel

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Justice Samuel Alito). *See also* Judge Harry T. Edwards, *Race and the Judiciary*, 20 Yale L. & Pol'y Rev. 325, 329 (2002) ("[R]acial diversity on the bench can enhance judicial decision making by broadening the variety of voices and perspectives in the deliberative process. . . . A more diverse judiciary also reminds judges that all perspectives inescapably admit of partiality.").

[38] *Next Steps*, *supra* note 9, at 5.

comfortable.[39] That level of comfort often manifests between attorneys and clients who have shared the experience of discrimination. This is not to say that minority clients must be represented by minority lawyers. However, many marginalized members of society may understandably put their trust more readily in lawyers who possess a shared background, or in lawyers who are members of firms that include and value minority lawyers, because a shared background can improve communication, comfort level, trust, decision-making, and advocacy in the attorney-client relationship. The lack of adequate diversity in the legal profession often means that the choice of a lawyer with that kind of shared experience, or of a law firm with minority members, is often unavailable to those marginalized members of society who are most in need of representation.[40]

While the challenges of representing such individuals should not solely be the mantle of lawyers who are members of minority groups, it is worth noting that minority lawyers have historically taken on some of the most challenging legal issues in an effort to bring justice to their communities.[41]

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[39] *See Trammel* v. *United States*, 445 U.S. 40, 51 (1980) (recognizing "the imperative need for confidence and trust" between attorneys and their clients).

[40] *See Next Steps, supra* note 9, at 5.

[41] From the Asian American lawyers who reopened the Japanese internment case of *Korematsu* v. *United States*, 323 U.S. 214 (1944), to the African American attorneys who were at the forefront of the struggle for civil rights, attorneys from

Thus, a diverse legal profession has the potential to more effectively represent a diverse client base, and to enhance the availability of legal services to pro bono, indigent, and other clients with the greatest need for such services, in effect improving access to justice for the public at large.

A diverse legal profession is also important for the United States to remain competitive in the global economy. As the Court observed in *Grutter*, the educational benefits of diversity are valued by "major American businesses [that] have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 330. In the years since that case was decided, the volume of American legal services provided to clients outside the United States each year has grown dramatically.[42] Remaining competitive in an

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racial minority groups have contributed to some of the most important legal, social, and political reforms in American history. *See* Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 Geo. J. Legal Ethics 155, 185–87 (2006) (discussing the extensive contributions of Justice Thurgood Marshall and Judge Constance Baker Motley to civil rights causes); Eric K. Yamamoto, *The Color Fault Lines: Asian American Justice from 2000*, 8 Asian L.J. 153, 154 (2001).

[42] The export of United States legal services generated $9.1 billion in receipts in 2014, a nearly 20 percent increase since 2008. U.S. International Services Tables, U.S. Dep't of Commerce, Bureau of Econ. Analysis, at Table 2.1 (Oct. 15, 2015), http://www.bea.gov/scb/pdf/2015/10%20October/1015_international_services_tables.pdf.

increasingly global economy and legal sector requires lawyers capable of working with people of different backgrounds and cultures.

B. Admissions Policies That Consider Race as Only One of Many Factors Help to Increase Minority Representation in the Legal Profession

Racial and ethnic diversity in the legal profession cannot be produced without diversity in undergraduate institutions and law schools. Undergraduate institutions serve as a pipeline to law schools, and law schools are the portal to the legal profession.[43] Public universities in particular are a primary source of law school applicants. For example, during the 2013–14 school year, the top ten "feeder schools" for law school applicants were all public universities.[44]

Admissions policies such as those at issue here remain important tools for ensuring that our legal system can adequately serve an increasingly diverse population in an increasingly global economy. During the period between 2000 and 2014, the

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[43] Deborah L. Rhode & Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 Fordham L. Rev. 2483, 2492–93 (2015), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5095&context=flr.

[44] *See Top 240 ABA Applicant Feeder Schools for Fall Applicants*, LSAC.org, http://www.lsac.org/docs/default-source/data-(lsac-resources)-docs/top-240-feeder-schools.pdf (last visited Oct. 25, 2015).

percentage of Americans who identified as Hispanic or Latino, black or African American, Asian/Pacific Islander, American Indian/Alaska Native, or having multiple racial backgrounds increased from 30.9 to 37.9.[45] However, in 2014, lawyers in these groups made up only 21.6 percent of associates and 7.33 percent of partners at law firms.[46] In addition, more than one-fifth of the 1,100 large, medium, and small law offices and firms surveyed reported that they had no minority partners in their ranks, and almost half reported no minority women female partners.[47]

Minorities also are underrepresented among lawyers who practice outside of law firms. A recent study found that 95 percent of elected prosecutors

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[45] *QuickFacts: United States*, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/00000.html (last revised Sept. 30, 2015, 11:29 PM); U.S. Census Bureau, U.S. Dep't of Commerce, Overview of Race and Hispanic Origin: 2010 Table 1 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf. African Americans made up 13.2 percent of the population (up from 12.3 percent in 2000); Asian Americans 5.4 percent (up from 3.6 percent in 2000); and non-white Hispanics and Latinos 15.4 percent (up from 6.1 percent in 2000). *Id.*

[46] *Women and Minorities at Law Firms by Race and Ethnicity—An Update*, Nat'l Ass'n for Law Placement ("NALP") (May 2015), http://www.nalp.org/0515research. The same report also noted that "[r]epresentation of Blacks/African Americans specifically is highest by far among staff attorneys, at 6.47%, compared with 4.01% of associates and less than 2% of partners and counsel. Among Hispanics figures range from 4.56% of staff attorneys to just over 2% of partners and counsel." *Id.*

[47] *Id.*

are white, and 60 percent of states have no elected African American prosecutors.[48] In 2014, only ten percent of Fortune 500 general counsel were minorities, including five percent who were African American, two percent Asian, and two percent Hispanic/Latino.[49] Among federal government lawyers, minorities accounted for only 18.7 percent of general attorneys in 2010.[50] And in the legal academy, minorities were only 16.8 percent of tenured faculty and 20.8 percent of law school deans in 2013.[51]

There is some evidence that the problem of implicit bias, discussed in section I.A *supra*, further exacerbates the already low rates of recruitment and retention of minority lawyers. A recent study on the impact of race on how young associates at law firms are evaluated provides a striking example

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[48] Press Release, Women Donors Network, New WDN Study Documents the Paucity of Black Elected Prosecutors (July 7, 2015), http://www.womendonors.org/new-wdn-study-documents-the-paucity-of-black-elected-prosecutors/ (follow "Click here to download the press release" hyperlink); *see also* Nicholas Fandos, *A Study Documents the Paucity of Black Elected Prosecutors: Zero in Most States*, N.Y. Times (July 7, 2015), http://www.nytimes.com/2015/07/07/us/a-study-documents-the-paucity-of-black-elected-prosecutors-zero-in-most-states.html?_r=2.

[49] Rhode, *supra* note 43, at 2485–86.

[50] Inst. for Inclusion in the Legal Profession, *IILP Review: The State of Diversity and Inclusion in the Legal Profession* 33 (2014), http://www.theiilp.com/resources/documents/IILP_2014_Final.pdf.

[51] *Id.* at 35.

of how implicit bias may stunt the advancement of minority lawyers.[52] In this study, sixty law firm partners were asked to review and comment on the exact same memo prepared by a hypothetical third-year litigation associate. Partners who were told that the memo was written by a white associate gave the memo an average rating of 4.1 out of 5.0 while partners who were told that the memo was written by an African American associate gave the memo an average rating of 3.2.[53] The partners also generally provided more positive qualitative comments on the white associate's memo than on the African American associate's memo.[54]

The impact of implicit bias in the legal profession is further supported by anecdotal evidence.[55] This perhaps should not be surprising, as courts have

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[52] Arin N. Reeves, Nextions, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills* (2014), http://www.nextions.com/wp-content/files_mf/1415194075201404011 4WritteninBlackandWhiteYPS.pdf.

[53] *Id.* at *2–3.

[54] *Id.* at *3.

[55] *See, e.g.*, Elizabeth Olson, *A Long and Arduous Path to Partnership for Black Lawyers*, N.Y. Times, Aug. 18, 2015, at B1, http://www.nytimes.com/2015/08/18/business/dealbook/many-black-lawyers-navigate-a-rocky-lonely-road-to-partner.html (discussing "cultural barriers" and "lack of cross-racial relationships" that hinder minority advancement at law firms).

long observed the role of implicit bias in the employment context generally.[56]

Differential treatment faced by minority lawyers may, in turn, contribute to higher minority attrition rates at law firms. In 2014, the attrition rate of minority associates at law firms—23 percent—was 35 percent higher than the rate for non-minorities.[57] Thus, more diverse educational institutions play at least two important roles in improving the diversity of the legal profession. First, they increase the pipeline of minority lawyers. Second, they help prepare *all* lawyers to move beyond implicit bias and stereotypes in their interactions with

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[56] *See, e.g.*, *Thomas* v. *Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) ("The concept of 'stereotyping' includes not only simple beliefs . . . but also a host of more subtle cognitive phenomena which can skew perceptions and judgments. . . . [O]ne such phenomenon [is] . . . the tendency of 'unique' employees (that is, single employees belonging to a protected class, such as a single female or a single minority in the pool of employees) to be evaluated more harshly in a subjective evaluation process.").

[57] The NALP Foundation for Law Career Research and Education, *Update on Associate Attrition: Findings from a National Study of Law Firm Associate Hiring and Departures—Calendar Year 2014*, 13 (2015); *see also* New York City Bar Office for Diversity and Inclusion, *2014 Diversity Benchmarking Report: Update to the Signatories of the Statement of Diversity Principles* 4 (2014), http://www.nycbar.org/images/stories/pdfs/diversity/benchmarking2014.pdf (reporting similar disparity in attrition rates).

individuals of other backgrounds, which, in turn, will promote a more inclusive legal profession.[58]

The ABA recognizes that the current representation of minorities in the legal profession is an improvement over much lower historical figures. From the time in 1965 when Dean Erwin Griswold of Harvard Law School called attention to the need for diversity at law schools until today, African American enrollment at law schools has grown from barely one percent to more than 10 percent.[59] The percentage of minority associates at law firms has increased by almost 50 percent since 2000, from almost 13 percent in 2000 to about 21.6 percent in 2015.[60] The percentage of minorities

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[58] Diversity in the legal profession may also help to ameliorate racial disparities in criminal sentencing. For example, a study of 40 urban United States counties from 1990 to 2002 reported that a higher concentration of African American attorneys in a given county was associated with a lower likelihood of incarceration for African American defendants and a reduction in the disparity in sentencing length between African American and white defendants. Ryan D. King, Kecia R. Johnson, and Kelly McGeever, *Demography of the Legal Profession and Racial Disparities in Sentencing*, 44 L. & Soc'y Rev. 1, 19, 23 (2010).

[59] *Admitted Applicants by Ethnic and Gender Group*, LSAC.org, http://www.lsac.org/lsacresources/data/ethnic-gender-applicants (last visited Oct. 10, 2015); William G. Bowen & Derek Bok, The Shape of the River 5 (1998).

[60] *Women and Minorities at Law Firms by Race and Ethnicity—An Update*, *supra* note 46; *Presence of Women and Attorneys of Color in Large Law Firms Continues to Rise Slowly*, NALP (Nov. 15, 2000), http://www.nalp.org/2000presenceofwomenattorneysofcolor.

serving as general counsels of corporations has increased nearly fourfold from approximately 2.5 percent in 1999 to 9 percent in 2015.[61] In addition, 28 percent of the federal judges confirmed during the past ten years have been African American, Hispanic/Latino, Asian American, or other racial or ethnic minority as compared to only 18 percent during the ten years prior.[62]

This advancement is in no small part attributable to admissions policies that consider race as one factor among many, policies that are currently in widespread use at public and private colleges and universities throughout the country. Educators and administrators at these institutions have determined, based on their expert judgment, that such admissions policies are crucial for the advancement of racial and ethnic diversity at their institutions. This determination is reflected by the groundswell of support from the education community twelve years ago for the University of

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[61] Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation*, The Washington Post Online (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that; Jaffe D. Dickerson & Matthew Scott, *General Counsel Share Keys to Success*, Minority Corporate Counsel Ass'n, Diversity and the Bar (Nov. 1999), http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1044.

[62] *See History of the Federal Judiciary: Biographical Directory of Federal Judges, 1789–present*, Federal Judicial Center, http://www.fjc.gov/history/home.nsf/page/judges.html (last visited Oct. 27, 2015).

Michigan's admissions policies considered in *Grutter*, three years ago in support of the University of Texas's admissions policies in *Fisher I*, and again today.[63]

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[63] In *Grutter*, over ninety public and private institutions of higher education filed amicus curiae briefs supporting the University of Michigan Law School's consideration of race as a factor in admissions. *See Grutter* v. *Bollinger*, Docket No. 02-241 (S. Ct.). One such institution, the American Law Deans Society (formerly the American Law Deans Association) ("ALDS") filed an amicus brief on behalf of 171 individual law schools emphasizing their support, not only for affirmative action, but for "the explicit consideration of race" in law school admissions. Br. of ALDS as Amicus Curiae in Supp. of Resp'ts, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399070, at *2. In addition, the law school deans of Georgetown Law Center, Duke Law School, University of Pennsylvania Law School, Yale Law School, Columbia Law School, University of Chicago Law School, New York University Law School, Stanford Law School, Cornell Law School, and Northwestern University School of Law in their individual capacities, as well as numerous other professional and academic organizations, filed amicus curiae briefs supporting affirmative action.

In *Fisher I*, over 114 public and private institutions of higher education and forty higher education organizations filed amicus curiae briefs in support of the University of Texas's admissions program, including the Association of American Law Schools, which counts 180 law schools among its membership. *See Fisher I*, Docket No. 11-345 (S. Ct.). These briefs discussed the vital importance of diversity in higher education, and in particular, admissions policies that consider race among a myriad of factors as an effective way to create diverse student bodies. *See e.g.*, Br. of Amicus Curiae Association of American Law Schools in Supp. of Resp'ts, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3527822, at *18–38; Br. of California Institute of Technology et

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Given the demographic changes taking place in our nation, and the growing evidence of the ongoing role that implicit and unconscious bias play in denying justice to racial and ethnic minorities, the ABA submits that the need for admissions policies in higher education that consider race as one factor among many remains compelling today. Such policies are important for dismantling racial bias and stereotypes that lawyers may harbor, and that affect the many roles they play in the administration of justice and public policy. These policies are equally important to further diversify our legal profession and justice system in order to support the perception, and reality, that our legal and political institutions fully reflect and represent all members of our society.

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al. as Amici Curiae in Supp. of Resp'ts, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3527857 at *23–28; Br. of Amicus Curiae The University of North Carolina at Chapel Hill Supporting Resp'ts, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3276512 at *15–25. The ABA understands that many similar institutions and organizations will file amicus curiae briefs supporting Respondents in this case.

CONCLUSION

For the reasons set forth herein, the ABA respectfully urges this Court to affirm the Fifth Circuit's ruling that the University of Texas at Austin's admissions policy is constitutional.

Respectfully submitted,

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